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INSURANCE POLICIES WILL NOT BE CONSTRUED NARROWLY LIKE CONTRACTUAL INDEMNITIES

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Legal Briefings – By **Mark Darwin** and **Peter Holloway**

The Full Federal Court has decided that a contract of insurance is not legally like a contract of indemnity, so insurance coverage clauses will not be construed narrowly and insurers are not entitled to have any coverage ambiguities resolved in their favour.

The takeaway message for policyholders is not to capitulate to adverse claims decisions by insurers, because both the Insurance Contracts Act and the Court's approach to interpretation of insurance policies could lead to better outcomes for policyholders.

TODD V ALTERRA AT LLOYDS LTD

In a coverage dispute over whether losses suffered by clients of a financial advisor were insured under a policy which indemnified the policyholder for losses in respect of 'professional services', the Court was asked to consider whether it was obliged to interpret any ambiguity in a policy of indemnity insurance in favour of the insurers.

The insurers had relied upon a series of High Court decisions to the effect that any doubt concerning the construction of contracts of guarantee and indemnity should be resolved in favour of the party giving the indemnity. They argued insurers were in the same position and should effectively get the benefit of any doubt.

The Full Court rejected the insurers' submission and held that this principle did not extend to insurance contracts, which were of a fundamentally different character and purpose.

While the Court accepted that the notion of indemnity is present in many contracts of insurance, it nevertheless noted that:

- the object or purpose of a guarantee or indemnity is to make good the financial position of a creditor, while a contract of insurance has the object or purpose of sharing the risk, or spreading the loss, from a contingency, and

- the historical position of the surety (who typically accepts obligations gratuitously) could be contrasted with that of an insurer.

Chief Justice Allsop and Justice Gleeson concluded that:

'From the nature, character and purpose of insurance there is no reason, and no precedent, for according an insurer the tenderness accorded to guarantors and indemnifiers…'.

LESSONS FOR POLICYHOLDERS

This decision affirms the long-established approach that contracts of insurance will be construed according to ordinary principles applied to the interpretation of contracts. Importantly, it makes clear that a contract of insurance has a fundamentally different character to a guarantee or indemnity and the principles that those forms of indemnity should be construed narrowly in favour of the party giving the indemnity do not apply to contracts of insurance – for example, the principle that ambiguity should be resolved in favour of the guarantor or indemnifier -- will not apply to contracts of insurance.

ENDNOTES

1. *Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* [2016] FCAFC 15.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

MARK DARWIN
PARTNER, BRISBANE

+61 7 3258 6632
Mark.Darwin@hsf.com

PETER HOLLOWAY
PARTNER, MELBOURNE
+61 3 9288 1693
Peter.Holloway@hsf.com

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